

The claimant requests review of the ALJ's Award. Claimant alleges she is permanently and totally disabled as a result of her September 1, 1999 work-related injury. In the alternative, claimant maintains she has suffered a significant permanent partial general disability due to that injury and is entitled to a 61 percent work disability.

Respondent argues the claimant's permanent partial disability award should be limited to her 5 percent functional impairment to the body as a whole, far less than the 18.4 percent work disability awarded by the ALJ. Respondent further maintains claimant is just as capable of substantial gainful employment now as she was before her injury and is therefore, not permanently and totally disabled under Kansas law.

The sole issue to be addressed is the nature and extent of claimant's disability, including her percentage of functional impairment and work disability and/or permanent total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ adequately and succinctly summarized the facts and medical opinions in the Award. As such, they do not need to be repeated herein, except as necessary to further explain the Board's findings.

Highly summarized, claimant was injured while assisting a disabled resident in a home care situation. Dr. Edward J. Prostic examined claimant in July 2000 and found very little objective evidence of any permanent injury, other than some mild disk narrowing at L5-S1. He ultimately assigned a 12 percent permanent partial impairment to the body as a whole based upon the range of motion model rather than the preferred DRE methodology. He also opined that claimant sustained a 21 percent task loss as a result of her injury.

Dr. Phillip Baker also examined claimant in July 2000 and diagnosed moderate stenosis at L4-5 and degenerative bulging of the disk at all levels. Dr. Baker could not identify any lumbosacral radiculopathy or peripheral neuropathy, and the MRI and EMG tests were negative. He ultimately assigned a 5 percent impairment using DRE Category II. Dr. Baker was not asked to comment on claimant's alleged task loss.

The ALJ adopted the 5 percent impairment expressed by Dr. Baker and neither party seriously disputes this finding. Given the objective findings and diagnosis, the Board finds 5 percent is reasonable and is affirmed.

The ALJ went on to find a work disability of 18.4 percent based upon the 21 percent task loss offered by Dr. Prostic¹ and a wage loss of 15.8 percent. This wage loss reflects an imputed wage of \$245.00 per week. The ALJ concluded the respondent had offered accommodated work that was "well within the work restrictions, that the [c]laimant did not have good cause to leave that employment, that she has not made a good faith effort to find other employment, and that a wage should be imputed to her."²

The accommodated job offered to claimant was essentially a sedentary-type job acting as a companion to those living in a sheltered home. Claimant actually worked at this job for a total of 11 days over approximately one month's time. On August 11, 2000, claimant left work early to enroll her children in school and has never returned to work. She advised respondent she could no longer work due to pain and every work day since that time she has called in to respondent and advised she would not be working that day. Curiously, respondent continues to maintain she is still an employee.

Based upon the entire record, the Board finds claimant is not permanently and totally disabled as she was able to perform this accommodated job. Her protestations of pain are, under these facts and circumstances, not persuasive.

Whether the ALJ appropriately imputed a wage based on these facts and circumstances is the primary issue in this appeal. The Kansas Appellate Courts, beginning with *Foulk*³, have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of the pre-injury wage at a job within the medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.⁴ Before claimant can claim entitlement to work disability benefits, she must first establish that she made a good faith effort to obtain or retain appropriate employment.⁵

The Board has also held that workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification,

¹ The only task loss opinion was that offered by Dr. Prostic.

² ALJ Award (Sept. 30, 2003) at 3.

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁴ *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267, Kan. 889 (1999).

⁵ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,⁶ where the accommodated job violates the worker's medical restrictions,⁷ or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.⁸

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis and is necessarily factually driven. The Board adopts the ALJ's findings and conclusions that claimant demonstrated bad faith in essentially abandoning her employment and that she has failed to make a good faith effort to secure alternative employment. The Board is not persuaded that claimant's three year history of daily calls to respondent advising of her inability to work constitutes good faith. Although the evidence strongly suggests claimant would be unable to secure other employment given her limited mental and physical capabilities, respondent nonetheless made an accommodated job available to her. Claimant failed to exercise good faith in continuing to perform that job and under the *Foulk* principles, a wage must be imputed to her.

The Board affirms the ALJ's decision to impute a \$245 a week wage to her which yields a 15.81 percent wage loss. Accordingly, the ALJ's Award granting a 18.4 percent work disability is affirmed.

The Board likewise affirms the ALJ's decision to award claimant only the cost of the prescription expenses prescribed by Dr. Wade B. Welch as well as any expenses associated with his care. Dr. Welch was the authorized treating physician and the remaining bills claimant incurred were as a result of treatment with Dr. Stephen Saylor, a practitioner who was not authorized by the respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce Benedict dated September 30, 2003, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2004.

⁶ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

⁷ *Bohanan v. U.S.D.* No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

⁸ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

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c: John J. Bryan, Attorney for Claimant
Thomas R. Hill, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director